In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-186

ANDREW MUNCHAK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a 1969 trial in the Southern District of New York, petitioner was convicted of mail fraud and sentenced to a term of imprisonment of one year, of which four months were to be served, and a fine of $1000. The conviction was affirmed on appeal. 433 F. 2d 531. Thereafter, he made a motion for a new trial based on newly discovered evidence. The district court denied the motion with an opinion,

reported at 338 F. Supp. 1283 (Pet. App. C), which discusses in great detail the evidence at the trial, the nature of the newly discovered evidence, and the relation of that evidence to the issues at trial. The court of appeals affirmed on the grounds set forth in the opinion of District Judge Weinfeld (Pet. App. A). We rely on that opinion of the district judge in urging that the petition for a writ of certiorari be denied.

As the district court pointed out, petitioner "overstates both the importance of the representation of RCA manufacture at trial and the alleged conclusiveness of the present tests" (Pet. App. 25a). There was no perjury; all that was involved was "an inadvertent, unintentional misstatement by a witness" (Pet. App. 21a). There was no suppression by the government, either intentional or accidental. And the "newly discovered evidence" would not have been significant in light of the key issues at the trial.[1]

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[1] One of the issues tendered in the petition is the propriety of the denial of the new trial motion without an evidentiary hearing. However, not only did neither side request such a hearing (Pet. App. 8a), but during oral argument on the motion in response to the judge's question on this point, petitioner's counsel stated that the facts were already before the court (Pet. 22).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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